Supreme Court, U.S.
FILED

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Case No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JESSE A. EDWARDS,

Petitioner,

v.

UNITED STATES DEPARTMENT
OF THE INTERIOR

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FOR WRIT PETITION OF CERTIORARI

JESSE A. EDWARDS, Pro Se
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7 S P

QUESTIONS PRESENTED

Should interest be paid on backpay awarded to a Federal Government employee by the United States District Court of Colorado?

PARTIES TO THE PROCEEDING

Petitioner:

Jesse A. Edwards, Pro Se
14378 West Bayaud Ave.
Golden, Colorado

Defendant:

Bruce Babbitt, Secretary
of Interior United States
Department of Interior
and Minerals Management Service

Represented by:

Solicitor General Department
of Justice
Tenth & Constitution Ave. N. W.,
Washington, D. C. 20530

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OFFICIAL OPINIONS DELIVERED

In one of the first cases giving retroactive effect to the Civil Rights Act of 1991, the U.S. District Court for the District of Columbia ruled that interest on attorneys' fees is available in discrimination suits against the federal government (Brown v. Marsh, DC DC, No. 80-1169 (CRR),11/21/94.) It appears in the Appendix at pages 9-18.

OPINION BELOW

On November 23, 1994, the Tenth Circuit, U.S. Court of Appeals affirmed the decision of the district court denying the petitioner's request for payment of interest of backpay awarded by the court. It appears at Appendix pages 1-8.

STATEMENT OF JURISDICTION

When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

No person shall . . . be deprived of life, liberty, or Property, without due process of law.

STATEMENT OF THE CASE

The District court agreed with the EEOC Examiner and found that Edwards was discriminated against on basis of race under Title VII of the Civil Rights Act of 1964. The court ordered that Edwards be promoted retroactively, including back pay and other benefits. The court did not award prejudgment interest. Edwards appealed, contending that he was entitled to prejudgment interest on the back pay award.

BASIS OF FEDERAL JURISDICTION IN THE FIRST INSTANCE

This is a Title VII case involving an employee of the Federal Government.

REASONS FOR GRANTING THE WRIT

The U. S. District Court for the District of Columbia ruled on 11/21/94, that interest on attorney's fees is available in discrimination suits against the federal government. This conflicts with the decision of the Tenth Circuit, U.S. Appeals Court on which this review is being requested. Although the basis of this District of Columbia case is the payment of interest on attorney fees, I would suggest that if the Governments does not have immunity against paying interest on attorney fees, then, it does not have immunity against paying interest on back pay, which is issue herein.

APPENDIX

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JESSE A. EDWARDS, on behalf of himself and all others similarly situated,

Plaintiff-Appellant-Cross-Appellee,

v.

BRUCE BABBIT, UNITED STATES DEPARTMENT OF THE INTERIOR, Minerals Management Service,

Defendants-Appellees-Cross-Appellants

Appeal from the United States District Court for the District of Colorado
(D.C. No. 85-C-2444)
(738 F.Supp. 426)

Jesse A. Edwards. Pro se.

Stuart M. Gerson, Assistant Attorney General, Michael J. Norton, United States Attorney for the State of Colorado, Marleigh D. Dover, Jonathan R. Siegel, Department of Justice, Washington, D.C.

Before ANDERSON, REAVLEY[1] and HENRY, Circuit Judges.

REAVLEY, Circuit Judge.

Jesse A. Edwards ("Edwards") brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended, and the age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 623 (a) and (d) against the United States Department of Interior, Minerals Management Service ("MMS"). The district court found that Edwards had been unlawfully discriminated against in violation of Title VII and ordered that Edwards be retroactively promoted. The government does not appeal this order. After a subsequent hearing on remedies, the district court awarded back pay with post-judgement interest, attorney's fees with interest, and other equitable relief, but denied prejudgment interest. Both parties appeal the subsequent remedial order. We modify the judgment to eliminate the award of interest.[2]

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[1] The Honorable Thomas M. Reavley, United States Court of Appeals, Fifth Circuit, sitting by designation.

[2] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. This case is therefore ordered submitted

BACKGROUND

Edwards has worked for the Minerals Management Service, previously the Royalty Management Program, since 1976. Since 1979, he has been employed at the GS-12 level. in 1981, 1982, and 1983, Edwards applied for numerous positions which would have constituted promotions. He was rejected and filed complaints of discrimination. An EEOC Complaints Examiner concluded that Edwards had been a victim of discrimination and recommended that he be promoted to a GS-13 position retroactive to June 1981 and to a GS-14 position retroactive to June 1982. In response, on November 27, 1985, MMS promoted Edwards to a GS-13 position, retroactive to June 13, 1982. Edwards brought suit in Federal District Court.

The district court agreed with the Examiner and found that Edwards was discriminated against on the basis of race under Title VII of the Civil Rights Act of 1964. The court ordered that Edwards be promoted to GS-13, effective June 1981, and GS-14, effective June 1982, including back pay and other benefits. Subsequent to the initial order, during a hearing on remedies in the case, Edwards asked the court to reopen a vacancy announcement for a GS-15 position, arguing that the government's delay in abiding by the court's order to promote him to GS-14

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without oral argument.

prevented his application for two GS-15 positions. The court refused to re-open the announcement. The court's subsequent remedial order also denied an award of prejudgment interest, but allowed an award of post-judgment interest and interest on attorneys fees.

Edwards appeals contending that the vacancy announcement for the GS-15 position should have been reopened and that he was entitled to prejudgment interest on the back pay award. The government Appeals the award of post-judgment interest and interest on attorneys fees. We agree with the government in all respects.

DISCUSSION

A. The Government's Immunity from Interest Awards

The Supreme Court has held that "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." Library of Congress v. Shaw, 478 U.S. 310, 314, 106 S.Ct. 2957, 2961, (1986). In Shaw, the Court went on to hold that Title VII did not contain a waiver of immunity from an interest award based on attorney's fees. id. at 323.[3] As

[3] The Civil Rights Act of 1991 amended Title VII to allow for interest on awards against the government. Pub. L. No. 102-166, tit. I, §114, 105 Stat. 1079 (codified at 42 U.S.C. §2000e-16(d)

Shaw is applicable to this case, we vacate the district court's award of interest on its attorney's fees award.

The "no-interest" rule, affirmed in Shaw, states that the United States Government is immune from awards of interest in general and not only interest on attorney fee awards. Id. at 314. The Supreme Court has held that although Title VII did not provide the requisite waiver of immunity for interest on attorney's fees in *Shaw*, the requisite waiver may be supplied under certain circumstances by another statute. Loeffler v. Frank, 486 U.S. 549, 565, 108 S.Ct. 1965, 1974-75 (1988). Edwards sought an exception to the "no-Interest" rule by relying on the Back Pay Act (the "Act") to argue that he was entitled to prejudgment interest on his award of back pay. The district court refused to award prejudgment interest, adopting the interpretation of the Back

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(1991)). The Supreme Court has held, however, that several provisions of the Civil Rights Act are not to be retroactively applied. Landgraf v. USI Film Products, 114 S.Ct. 1483, 1508 (1994); Rivers v. Roadway Exp., *Inc.*, 114 S.Ct. 1510, 1519-20 (1994). Although these decision did not deal with the section of the Civil Rights Act related to interest, §114, the rationale for supporting the presumption against retroactive application to the sections at issue is those cases also supports a presumption against retroactive application of §114.

Pay Act given by the D.C. Circuit in Brown v. Secretary of the Army, 918 F.2d 214, 216 (D.C. Cir. 1990). We agree and also adopt Brown's interpretation of the Back Pay Act.

Brown held that "the Back Pay Act, to the extent of its coverage, waives the federal government's sovereign immunity against prejudgment interest on Title VII back pay awards. . . ." Id. at 218. Therefore, prejudgment interest is available if a case falls within the coverage of the Back Pay Act. That Act, however, expressly limits its coverage to back pay awards stemming from the unlawful "withdrawal or reduction" of compensation. 5 U.S.C. §5596(b)(1) (1980). This language excludes failure to increase someone's compensation, which is the case in a promotion denial. In 1978, congress amended the Back Pay Act to include "the Omission or failure to take an action or confer a benefit" within the scope of personnel actions covered by the Act. Pub. L. No. 95-454, §702, 92 Stat. 1111, 1216 (1978) (codified at 5 U.S.C. §5596(b)(3)(1980)). This language indicates that promotions may be included in the coverage of the Back Pay Act. Congress did not change, however, the language indicating that it covered only back pay awards stemming from the unlawful "withdrawal or reduction" of compensation.

The court in Brown reconciled the language by holding that the Back Pay Act covers illegal refusals to make mandatory promotions, but does not cover discretionary or noncompetitive promotions. If a promotion is mandatory

or nondiscretionary, and increase in compensation is automatic and a failure to provide for that increase is a reduction in compensation. This interpretation is consistent with congressional intent evidenced in the legislative history of the 1978 amendment. As the D.C. Circuit noted, a senate Report on the amendment stated that the reference to personnel action that is "unjustified or unwarranted" in the amended Back Pay Act means "'acts of commission as well as omission with respect to nondiscretionary provision of law, Executive order, regulation, or collective bargaining agreement.'" Brown, 918 F.2d at 220 n.4 (quoting S.Rep. No. 969, at 115 (emphasis added)).

We adopt this interpretation of the Back Pay Act. The promotions at issue in this case were competitive and discretionary. Therefore, this case is not covered by the Back Pay Act. As there is no other basis for a waiver of immunity with respect to prejudgment interest, we affirm the district court's denial of prejudgment interest.

The district court did not indicate what statute it found congressional consent to an award of post-judgment interest. We know of no authority for a waiver of immunity to post-judgment interest in this case and therefore vacate the district court's award of post-judgment interest.

B. Re-opening of Vacancy Announcement

Because Edwards was not retroactively promoted to GS-14 until December 30, 1990, he was unable to apply for two GS-15

positions offered in a vacancy announcement at MMS. Edwards seeks a reopening of this announcement so that he can apply. The district court found that there was no evidence suggesting that had Edwards been promoted earlier, he would have secured either position offered. The district court concluded that Edwards' experience would have made him a weak candidate for the position in question. The district court made the factual determinations that a criteria for the positions in question was supervision of auditors and Edwards had done no formal audit work since 1981 and had little experience supervising auditors. Edwards does not challenge these findings. "A court . . . cannot under Title VII properly order the promotion of an employee to a position for which he or she is not qualified." Locke v. Kansas City Power & Light Co., 660 F.2d 359, 368 (8th Cir. 1981) (citations omitted). The district court did not abuse its discretion in refusing to re-open the vacancy announcement.

CONCLUSION

We modify the district court's judgment to vacate the award of post-judgment interest and interest on the attorney's fees and award and affirm the judgment in all other respects.

AFFIRMED AS MODIFIED.

UNITED STATES DISTRICT COURT FOR DISTRICT OF COLUMBIA

JAMES E. BROWN Plaintiff V. JOHN O. MARSH, Jr. Secretary of the Army Defendant	)	Nos. 80-1169 (CRR)

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

INTRODUCTION

In 1991, Congress amended the Civil Rights Act of 1964 ("The 1964 Act"), as amended in March, 1972. 42 U.S.C. s 2000a et seq. The Civil Rights Act of 1991 ("The 1991 Act") provides in Section 114 that: The provisions of section 2000e-5 (f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

42 U.S.C. s 2000e-16(d) ("Section 114") (emphasis added). Section 114 entitles a prevailing party in a Title VII action to an award of interest on previously awarded attorney's fees and expenses.

The question presented in this case is whether the above statute, which provides for interest on attorney's fees and expenses, applies to a case that was pending at the time the statute was enacted.

Upon careful consideration of the pleadings, oral argument, and the applicable law, the Court holds that Section 114 applies to the case at bar, entitling the Plaintiff to interest on

his attorney's fees and expenses. In addition, the Court holds that interest shall be calculated in accordance with the judgment rate of interest prescribed in 28 U.S.C. s 1961.

FACTS

On August 20, 1992, the Court awarded attorney's fees and expenses to the Plaintiff as a prevailing party in a Title VII action. However, the Court reserved the issue of whether interest on those fees is awardable pending resolution by the District of Columbia Circuit of the applicability of the Civil Rights Act of 1991 to pending cases.

In late 1994, the Plaintiff filed an application for interest on his attorney's fees in light of this Circuit's decision in Gersman v. Group Health Ass'n Inc., 975 F.2d 886, 898 (D.C.Cir.1992), cert. denied,--- U.S. ----, 114 S.Ct. 1642, 128 L.Ed.2d 363 (1994), and the Supreme Court's decision in Landgraf v. USI Film Prods., --- U.S. ---,--- - ---, 114 S.Ct. 1483, 1501-02, 128 L.Ed.2d 229 (1994).

In response, the Government agreed to pay the plaintiff interest on his attorney's fees and expenses incurred after the enactment of Section 114 of the Civil Rights Act of 1991. However, the Government contended that the Plaintiff is not entitled to any interest on fees prior to the enactment of Section 114. According to the Government, there is a presumption against the retroactive application of a statute whenever applying the statute would affect the parties'

substantive rights. See e.g., Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208, 109 S.Ct. 468, 471-72, 102 L.Ed.2d 493 (1988). The Government contends that the presumption against retroactivity applies in this because awarding interest on attorney's fees is a compensatory damage award and, therefore, would affect their substantive rights. Nevertheless, even if the Plaintiff were entitled to interest, the Government argues, the appropriate rate of interest is the judgment rate of interest prescribed in 28 U.S.C. s 1961.

The Plaintiff, in response, contends that the presumption against retroactive application of a statute does not arise when the application is merely collateral. In such cases, a court must apply the law that exist at the time that it renders its decision. See e.g., Bradley v. Richmond School Bd., 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974). According to the Plaintiff, awarding interest on attorney's fees in a case that was pending when Section 114 was enacted is purely collateral and, therefore, does not affect the substantive rights of the parties. Consequently, the Plaintiff argues that he entitled to interest on his attorney's fees and that the appropriate rate of interest is the prime rate.

Upon review of the pleadings, oral argument, and applicable law, the Court finds that the Section 114 of the Act allowing for interest on attorney's fees does not affect the parties' substantive rights. Therefore, the presumption against retroactive application of a

statute does not apply. Instead, the Court must apply the law that exists at the time it renders its decision. Since Section 114 is currently effective, the Court finds that the Plaintiff is entitled to an award of interest on his attorney's fees and costs. In addition, in view of the substantial case law applying the judgment rate of interest instead of the prime rate of interest to an award of attorney's fees, the appropriate rate of interest is the judgment rate set forth in 28 U.S.C. s 1961.

DISCUSSION

I. THE COURT FINDS THAT THE PLAINTIFF IS ENTITLED TO INTEREST ON HIS ATTORNEY'S FEES AND COSTS BECAUSE APPLYING SECTION 114 RETROACTIVELY ONLY AFFECT THE COLLATERAL RIGHTS OF THE PARTIES.

[1] Section 114 of the Civil Rights Act of 1991 entitles a prevailing party to interest on attorney's fees from a Government party. 42 U.S.C. s 2000e-16 (d) ("Section 114"). At the time that Section 114 took effect in November of 1991, the instant action was still pending before this Court.

[2] To decide if Section 114 applies retroactively, the Court must first look to the language of the statute itself. E.g., Planned Parenthood Fed'n of Am. v. Heckler, 712 F.2d 650, 655 (D.C.Cir.1983) (citing CPS v. GTE Sylvania, Inc., 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980)). However, since the statue is silent with respect to whether Section 114 applies retroactively or not, the Court

must look to the relevant case law.

[3] According to case law, if applying a statute retroactively would affect the parties' substantive rights, then a presumption against retroactive application of a statute arises. Landgraf v. USI Film Prods., --- U.S. ----,----,----, 114 S.Ct. 1483, 1499, 1502, 128 L.Ed.2d 229 (1994); Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208, 109 S.Ct. 468,471-72, 102 L.Ed.2d 493 (1988); Gersman V. Group Health Ass'n, Inc., 975 F.2d 886, 898 (D.C.Cir.1992) cert. denied, --- U.S. ----, 114 S.Ct. 1642, 128 L.Ed.2d 363 (1994). Based on that presumption, a statue will not be applied retroactively.

[4] In contrast, if applying a statute retroactively would only affect the parties' collateral rights, then a court is to apply the law that exist at the time it enters its decisions. Landgraf v. USI Film Prods., --- U.S. --- - ---, 114 S. Ct. 1483, 1501-02, 128 L.Ed.2d 229 (1994); see L.Ed.2d 476 (1994); Thrope v. Housing Auth. of Durham, 393 U.S. 268, 281, 89 S.Ct. 518, 525-26, 21 L.Ed.2d 474 (1969); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801); Gersman v. Group Health Ass'n, Inc., 975 F.2d 886, 898-99 (D.C.Cir.1992), cert. denied, --- U.S.----, 114 S.Ct. 1642, 128 L.Ed.2d 363 (1964). Accordingly, a statute that does not affect the substantive rights of the parties will be applied retroactively.

In applying the foregoing analysis to the case at bar, the Court must decide if awarding the Plaintiff interest on his

attorney's fees affects the parties' substantive rights. For if the award of interest on attorney's fees affects a substantive right, the traditional presumption against retroactive application of a statute applies. Conversely, if the award of interest on attorney's fees is a collateral or secondary matter, the Court is to apply the law that exists at the time it renders its decision. Upon examining the nature of an award of interest on attorney's fee's, the Court holds that interest on attorney's fees are merely collateral or secondary, and therefore, are awardable in this case for three reasons.

First, prior to the enactment of Section 114, plaintiffs in a Title VII action were entitled to interest on attorney's fees in private-sector cases. See, 42 U.S.C. s 2000e-5(k) (1982); e.g., Rodgers v. United States, 332 U.S. 371, 373-74, 68 S.Ct. 5, 6-7, 92 L.Ed. 3 (1947); Chrapliwy v. Uniroyal, Inc., 670 F.2d 760, 764, & n. 6 (7th Cir.1982), cert. denied, 461 U.S. 956, 103 S.Ct 2428, 77 L.Ed.2d 1315 (1983) The enactment of Section 114 merely extends an award of interest to cases involving the Government. Consequently, as a mere "extension" of prior law, Section 114 does not substantively change the parties' rights.

Second, the Supreme Court has held that since awarding attorney's fees is uniquely separable from the cause of action to be proved at trail, awarding such fees is a collateral issue. White v. New Hampshire Dept. of Employment

Security, 455, 451-52, 102 S.Ct. 1162, 1166-67, 71 L.Ed.2d 325 (1982). It follows from White that a statute, such as Section 114, that awards interests on those fees must also be a collateral issue.

Third, the Government can not contend that their substantive rights will be affected because prior to the enactment of Section 114, parties were already entitled to attorney's fees in the private-sector cases. Section 114 merely added that interest on those fees shall also be payable in public-sector cases. Thus, Section 114 does not add a substantive obligation on part of the Government. Moreover, Section 114 of the 1991 Act waives sovereign immunity with respect to interest.

Based on the foregoing, since an award of interest on attorney's fees is a collateral issue, Section 114 shall apply to this case and, therefore, the Plaintiff is entitled to interest on his attorney's fees.

II. THE PLAINTIFF'S INTEREST ON ATTORNEY'S FEES SHALL BE CALCULATED BASED ON THE UNITED STATES TREASURY BILL RATE BECAUSE OF THE SUBSTANTIAL CASE LAW THAT APPLIES SECTION 1961(a) TO JUDGMENTS AWARDING ATTORNEY'S FEES.

[5] Since the Court has found that the Plaintiff is entitled to interest on attorney's fees, the Court must now decide the appropriate interest rate. According to the Plaintiff, the calculation should be based on the prime rate of interest for

each year they were entitled to fees. (Pl's. Mot. for Interest on Attorney's fees at 9.) In his argument, Plaintiff cites to several cases that apply the prime rate of interest. Id. (citing e.g., Alberti v. Klevenhagen, 896 F.2d 927, 938 (5th Cir.1990) (prime rate of interest is applied to compensate counsel for delay in payment).

However, the fatal flaw in Plaintiff's argument is that those decisions used the prime rate when the payment of attorney's fees--not interest--has been delayed. In contrast, the Plaintiff, here, has already received attorney's fees. At issue is only the payment of interest.

In calculating the interest due the Plaintiff, the Court is, instead, persuaded that the statute providing for payment of interest on a judgment shall apply. The statute, 28 U.S.C. s 1961(a), calculates interest due upon a judgment based upon the United States Treasury Bill rate. The statute provides:

Interest shall be allowed on any money judgment in a civil case recovered in a district court.... Such interest shall be calculated ... at a rate equal to the coupon yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment.

28 U.S.C. s 1961(a) ("Section 1961"). Since it is well-settled that Section 1961 is used to calculate the interest due on a

judgment awarding attorney's fees, see e.g., MidAmerica Fed. Savs. & Loan Ass'n v. Shearson/Am. Express, Inc., 962 F.2d 1470, 1475-77 (10th Cir.1992); cf.

Oklahoma Aerotronics, Inc. v. United States, 943 F.2d 1344, 1349 (D.C.Cir.1991), the Court shall apply the United States Treasury Bill rate of interest in determining the amount of interest due the Plaintiff.

In response to the Court's request, the Defendant computed the interest that would be due the Plaintiff for the period ending November 21, 1991 in accordance with 28 U.S.C. s 1961(a). According to those calculations, the total amount of interest due is $21,952.68. The portion due Reed, Smith is $13,468.94 and the portion due the Lawyers' Committee is $8,483.74.

Therefore, based on the Defendant's calculations, the Court shall award plaintiff interest on his attorney's fees in the amount of $21,952.68.

CONCLUSION

For the foregoing reasons the Court shall award the Plaintiff interest on his attorney's fees based on the United States Treasury Bill rate of interest. The Court shall enter an Order of even date herewith.

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